

IBLA 79-532
79-540

Decided November 27, 1979

Appeal from decision of the Arizona State Office, Bureau of Land Management, declaring mining claims abandoned and void. AMC 13512-AMC 13581.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rules and Regulations -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intent to Hold Mining Claim -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

43 CFR 3833.1-2(d) states that a location notice for each mining claim, millsite, or tunnel site filed for recordation shall be accompanied by a service fee. As this is a mandatory requirement, there is no recordation unless the documents are accompanied by the stated fee, or until it is paid. Therefore, where a notice of location of a mining claim is submitted to BLM for recordation on Sept. 30, 1977, and the filing fee therefore is not paid to BLM until July 18, 1978, the recordation date of the notice of location is July 18, 1978. In the circumstances, the evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim must be filed in the proper BLM office on or before Oct. 22, 1979, pursuant to 43 CFR 3833.2-1(a). Duly promulgated regulations have the force and effect of law and are binding on the Department.

APPEARANCES: Jerry L. Haggard, Esq., Evans, Kitchel & Jenckes, P. C., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated July 19, 1979, of the Arizona State Office, Bureau of Land Management (BLM), declaring the Cholla Nos. 1 through 36 mining claims (AMC 13512 through AMC 13547) and the Ruth Nos. 1 through 34 mining claims (AMC 13548 through AMC 13581) abandoned and void for failure to timely file an affidavit of labor performed (annual assessment statement), as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the regulation, 43 CFR 3833.2-1.

The facts are as follows: All of the above claims were located prior to October 21, 1976. The location notice for each of the above claims was received for recording by BLM on September 30, 1977. However, the location notices were not accompanied by the service fee, \$350 (\$5 per claim) as required by 43 CFR 3833.1-2(d). On December 4, 1978, BLM wrote to appellant advising that the service fee should have accompanied its filing and suggesting that appellant remit the required amount. No affidavits of assessment work or notices of intention to hold were submitted in the above mining claims on or before December 30, 1978. By letter dated June 18, 1979, BLM advised appellant that the service fee had to be remitted to BLM within 30 days of appellant's receipt of the letter or appellant's filings would be rejected. 1/ On July 18, 1979, appellant filed the required payment. On the following day, BLM issued the above decision holding appellant's claims abandoned and void for failure to comply with 43 CFR 3833.2-1(a). 2/

In his statement of reasons appellant points out that the relevant regulation is 43 CFR 3833.1-2(d) which provides: "(d) Each claim or site filed shall be accompanied by a one time \$5 service fee which is not returnable. A notice or certificate of location shall

1/ The letter also requested appellant to furnish maps or sketches showing the location of each claim as required by 43 CFR 3833.1-2(c)(7).

2/ 43 CFR 3833.2-1(a) (May 1979) states:

"The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, whichever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim."

not be accepted if it is not accompanied by the service fee and shall be returned to the owner." Appellant notes that the language "shall be accompanied by" in the regulation is mandatory. Appellant interprets the regulation as requiring the rejection of all filings not accompanied by the service fee, and asserts that his filings should accordingly have been rejected.

Appellant asks the Board to remand the case with instructions to find either that the initial filings of the location notices was ineffective, or, in the alternative, that recordation was effective on July 18, 1979, when the service fee was filed.

[1] The regulation dispositive of this appeal is 43 CFR 3833.1-2(d), supra. Both sentences of that regulation refer to the requirement that the service fee must accompany the claim or site filed, and the second sentence mandates rejection and return to its owner, of a filing not accompanied by the fee.

In a recent decision, Joe B. Cashman, 43 IBLA 239 (1979), we construed that regulation in a manner which controls the disposition of the case at bar. We stated at 43 IBLA 240:

43 CFR 3833.1-2 requires that, for mining claims, millsites, or tunnel sites located prior to October 21, 1976, a copy of the location notice must be recorded with the proper office of BLM within 3 years, or before October 22, 1979. For such claims or sites located after October 21, 1976, the location notice must be recorded in the proper BLM office within 90 days following date of location. 43 CFR 3833.1-2(d) states that each claim or site filed with BLM shall be accompanied by a \$5 service fee. This is a mandatory requirement. Without payment of the filing fee, there is no recordation. Thus, as the filing fee for the notices of Apex No. 1 and Apex No. 2 millsites was not paid until February 10, 1978, it must be held that the date of recordation of these claims with BLM cannot be considered to have occurred earlier than that date. [Emphasis in original.]

It necessarily follows that the recordation date in the case at bar is July 18, 1978, the date the filing fees were paid. In the circumstances, under 43 CFR 3833.2-1(a) evidence of assessment work performed during the preceding assessment year or a notice of intention to hold the claims was not required to be filed in the proper BLM office until October 22, 1979.

Therefore, the decision of July 19, 1979 holding the mining claims void for failure to file such instruments prior to December 31, 1978, was in error.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to the Arizona State Office for further action in conformance with the views expressed herein.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

